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IN THE

Supreme Court of the United States

October Term, 1962

NO. 415

BUCK C. MILLER, *Appellant*

versus

P. FRANK LAKE, SECRETARY OF STATE,
Appellee

APPEALED FROM THE SUPREME COURT OF TEXAS

JURISDICTIONAL STATEMENT

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APPEALED FROM THE SUPREME COURT OF TEXAS

To: The Honorable Supreme Court of the United States of America:

Jurisdictional Statement

Appellant appeals from the final judgment of the Supreme Court of Texas in overruling the motion of Petitioner for leave to file Petition for Writ of Mandamus, Petitioner filed a Petition for Mandamus against P. Frank Lake, Secretary of the State of Texas, seeking to have the name of Buck C. Miller, placed and printed upon the official ballot to be prepared for and to be voted at

the General Election to be held in Harris County, Texas, on the 6th day of November, 1962, to become a non-partisan or independent candidate for Judge of the Probate Court of Harris County, Texas.

Opinions Below

The Supreme Court of The State of Texas refused the Petitioner the right to file the Petition for Mandamus.

The order of the Supreme Court of Texas, refusing Petitioner leave to file Petition for Mandamus was rendered on August 6, 1962, is appended here as Appendix "A".

The order of the Supreme Court of Texas, overruling Petitioner's Motion for Rehearing, rendered on August 20, 1962, is appended hereto as Appendix "B".

Jurisdiction

The Supreme Court of Texas is the highest Court of Texas in which a decision in this cause could be had. It being a mandamus proceeding against an officer of the Executive Department of the State, the Supreme Court is expressly given exclusive jurisdiction.

Vernon's Texas Constitution, Article 5, Section 3;
Vern. Ann. Tex. Civil Statutes, Vol. 3, Art. 1733;
28 Tex. Jur. Mandamus, p. 593.

Its order overruling Petitioner's Motion for Rehearing was entered August 20, 1962, 28 *U.S.C.*, Sec. 2101(c).

Jurisdiction to review this case upon Writ of Certiorari is conferred upon this Court by Title 28, *U.S.C.*, Sec. 1257 (2).

An attack is made upon a statute of Texas and the following cases sustain jurisdiction of the Supreme Court to review the judgment below by direct appeal:

Hamilton v. University of California, 293 U.S. 245, 257-258;
Williams v. Bruffy, 96 U.S. 176, 183;
Atchison, Topeka & S. F. R. Co. v. Public Utilities Comm., 346 U.S. 346, 348-9.

Notice of appeal to this Court was filed in the Supreme Court of Texas on August 27, 1962.

Statutes Involved

Article 13.50 Election Code, *Vernon's Texas Civil Statutes* Vol. 9, p. 323. Non-Partisan and Independent Candidates.

The name of a non-partisan or independent candidate may be printed on the official ballot in the column for independent candidates, after a written application signed by qualified voters addressed to the Secretary of State and delivered to him within thirty (30) days after the second primary election day as follows: if for a State office to be voted for throughout the State, one per cent (1%) of the entire vote of the State cast for Governor at the last preceding general election; if for a congressional, supreme judicial, senatorial, representative, flotorial or judicial district office, three per cent (3%) of the entire vote cast for Governor in any such district at the last preceding general election; provided, that the number of signatures need not exceed five hundred (500) for any congressional, senatorial or judicial office, nor for any other office that is not filled by all the voters of the State. No application to the

Secretary of State shall contain the name of more than one (1) candidate, and no citizen shall sign such application, unless he has paid his poll tax or received his certificate of exemption; provided, that, if the office is one to which two (2) or more persons are to be elected, his application may be for as many candidates as there are persons to be elected to that office; and provided, also that no person who has voted at a primary election shall sign an application in favor of any one for an office for which a nomination was made at such primary election. Acts 1951, 52nd Leg., p. 1097, ch. 492, Art. 227.

Article 13.51 Election Code, *Vernon's Texas Civil Statutes*, Vol. 9, p. 324. Oath to Application.

To every citizen who signs such application, shall be administered the following oath, which shall be reduced to writing and attached to such application, viz.: "I know the contents of the foregoing application; I have participated in no primary election which has nominated a candidate for the office for which I (here insert the name) desire to be a candidate; I am a qualified voter at the next general election under the Constitution and laws in force, and have signed the above application of my own free will." One (1) certificate of the officer before whom the oath is taken may be so made as to apply to all to whom it was administered. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 228.

Article 13.52 Election Code, *Vernon's Texas Civil Statutes*, Vol. 9, p. 325, Must Consent to Run.

The Secretary of State shall, on receipt of the application which conforms to the above requirements, issue his instruction to the county clerks of this State, or of the district, as the case may require, directing that the name of the citizen, in whose favor the application is made,

shall be printed on the official ballot in the independent column under the title of the office for which he is a candidate; provided, that the citizen, in whose favor the application is made, shall first file his written consent with the Secretary of State to become a candidate, within thirty (30) days after primary election day. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 229.

Article 13.53. Election Code, *Vernon's Texas Civil Statutes*, Vol. 9, p. 325.

Independent condidates for office at a county, city, or town election may have their names printed upon the official ballot on application to the County Judge, if for a county office, or to the mayor, if for a city or town office, such application being in the same form and subject to the same requirements herein prescribed for applications to be made to the Secretary of State in case of State or district independent nomination; provided, that in county elections it shall be necessary for nomination of independent candidates for the independent candidate to file a petition with the County Judge, signed by five per cent (5%) of the entire vote cast in such county at the last general election, endorsing such candidate for a particular county office. And provided further, in elections for a city or town office, it shall not be necessary that independent candidates be nominated, but anyone otherwise qualified may have his name printed upon the official ballot for a particular office by filing his sworn application with the Mayor at least thirty (30) days prior to the election day and by paying such filing fees as may be required by Statute or by charter provision. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 230.

The pertinent provisions of Art. 13.12 of the Election Code, *Vernon's Texas Civil Statutes*, Vol. 9, Pocket part

p. 48, are: Any such request shall be filed with the State Chairman in the case of state-wide races, with the district chairman in the case of districts consisting of more than one (1) county, and with the county chairman in case of county and precinct officers; such request shall be filed not later than the first Monday in February preceding such primary, and shall be considered filed if sent to such chairman at his post office address by registered mail from any point in this State, provided, however, that in the event that there is no candidate for the nomination of any office due to the death of the one who had filed or for any other reason, applications may be filed not later than the first Monday in March preceding the primary.

The pertinent provisions of Art. 13.47a: Election Code, *Vernon's Texas Civil Statutes*, Vol. 9, pocket part, p. 63. Sec. 3. As a condition precedent to having a candidate's name printed on the official ballot under Article 227 or Article 230 (Articles 13.50 and 13.53) of this Code, there must, in addition to the requirement of those two (2) Articles, be filed, with the person with whom the written application must, thereunder, be filed, an affidavit, duly acknowledged by the person desiring his name to be placed on the ballot stating his occupation, county of residence, post office address, age, and the office for which he intends to run. The affidavit must be filed at the same requests under Article 190 13.12 of this Code must be filed.

V.A.T.S. Election Code, Art. 1401. Definitions.

The word "candidate" shall mean any person who has announced to any other person or to the public that he is a candidate for the nomination for or the election to any office which the laws of this State require to be determined by an election. The words "county office" shall mean any office to be filled by the choice of the voters residing in

only one (1) county or less than one (1) county. The words "district office" shall mean any office to be filled by the choice of the voters residing in more than one (1) county. The words "state office" shall mean any office to be filled by the choice of voters of the entire State. The above classification of offices shall include all offices of the United States Government filled by elections.

Questions Presented For Review

(1) Is Art. 13.53, Election Code, *Vernon's Texas Civil Statutes*, Volume 9, which requires the nomination of an independent candidate for a county office to have the endorement of five (5%) of the voters who voted at the last General Election which in this case be an endorsement containing the names of more than 10,000 qualified voters void because of discriminatory legislation in violation of due process of law when tested by Art. 1, Section 3, of the *State Constitution of Texas* and the issue of due process of law, and equal protection of the law as guaranteed under the Fourteenth Amendment of the United States Constitution in that Art. 13.53 Election Code requires more of an independent candidate than Art. 13.50 Election Code, pertaining to district and state offices which provides that in no event shall more than 500 qualified endorsers ever be required for filling an office that is voted upon by less than all the voters of the State in order for an independent candidate or non-partisan candidate to get his name on the general ballot?

(2) Are the provisions of Article 13.47a of the Election Code relating to a non-partisan or independent candidate discriminatory in that such non-partisan or independent candidate must file his intention to run not later than

the 1st Monday in February, preceding the primary of candidates running for office in the primary of a political party, and that such provisions clearly deprive qualified voters, who have not voted in any primray of a political party from nominating a non-partisan or independent candidate for office at a General Election in that if no person files an affidavit as a non-partisan or independent candidate at the time required by Art. 13.47a and 13.12 of the Election Code, then the provisions of said Articles have effectively prohibited and deprived the qualified voters, who have not voted in a primary from nominating a non-partisan or independent candidate for office to be voted on at the next General Election?

Further the requirements of Articles 13.12 and 13.47a of the Election Code when construed in connection with Art. 13.50 and 13.53 of the Election Code, as they apply to a non-partisan or independent candidate, are discriminatory and place a greater burden on the non-partisan or independent candidate, than the requirements pertaining to a candidate who offers himself as a candidate for public office on a political party primary.

That such provisions pertaining to non-partisan or independent candidates are arbitrary, capricious, wilful and discriminatory, and are vague and indefinite and are in violation of Art. 1, Section 3, of the Constitution of Texas and the 14th Amendment to the Constitution of the United States.

(3) Can a State Court refuse to order a Petition for Mandamus to issue placing the petitioner's name on the ballot as an Independent candidate for Judge of the Probate Court of Harris County, Texas, due to the fact that the Petitioner voted in the Democratic primary on May 5, 1962, on the ground that the petitioner owes a moral

obligation to support the nominee of the Democratic Party in that since having voted in such primary it has become apparent that such nominee has failed in his duties as a Judge and has forfeited his rights to the moral support by the petitioner in that on June 20, 1962, the Grand Jury of Harris County, Texas, returned true bills of indictments against the nominee of the Democratic Party for Judge of the Probate Court of Harris County, Texas, charging and indicting him with the intent to defraud the heirs and distributees of estates in which he was Judge and for converting to his own use money belonging to the estates with a suit being filed against him charging him with official misconduct and incompetency of office for the conversion of money belonging to estates over which he presided as Judge of the Probate Court of Harris County, Texas, for which he has been suspended?

(4) Does due process of law under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and Art. 1, Section 3, of the Constitution of Texas, require the State of Texas, when it has enacted legislation for independent or non-partisan candidates to run for public office require such law to be clear, definite, and not discriminatory in order that a person may seek to be elected to public office at an election conducted pursuant to legal authority?

(5) Does the fact that petitioner failed to file his notice of intent to run for office by the 1st Monday in Februare, 1962, as provided by Section 3 of Art. 13.47a of the Election Code prevent his name from being placed on the general ballot, when to have done so would have been a futile thing, in the event Article 13.47a should be held to be constitutional?

Statement of the Case

Buck C. Miller, Appellant, is an Attorney at Law licensed to practice law in Texas, and has complied with the provisions of the State Bar Act of Texas, and is a member of the bar in good standing.

That he is fully qualified to hold the office of Judge of the Probate Court of Harris County, Texas, if elected thereto, and is a candidate for such office.

Appellee, P. Frank Lake, Secretary of the State of Texas, is and at all times herein involved has been the Secretary of State of the State of Texas.

On July 2, 1962, there was delivered to the Appellee, as Secretary of State aforesaid, at the Secretary of State's Office in the Capitol Building in the City of Austin, Travis County, State of Texas, in full compliance with the Statute known as Articles 13.50 and 13.51 of *Vernon's Annotated Texas Election Code* as amended, the petitions and applications containing the names of more than seven hundred (700) qualified persons endorsing and nominating Buck C. Miller as an independent candidate for Judge of the Probate Court of Harris County, Texas, which were duly signed, sworn, and certified in full compliance with the Statute known as Art. 13.50 and 13.51 of said Election Code as amended.

On July 2, 1962, Appellant duly filed with said Secretary of State, at his said office, appellant's duly executed written consent to become a non-partisan or independent candidate for the office of Judge of the Probate Court of Harris County, Texas, in the General Election of November 6, 1962.

Appellant therefore, on and at all times after July 2, 1962, was, has been, and is absolutely entitled to have

Appellee, as said Secretary, certify appellant's name as the name of such candidate as required by the statute known as Art. 1.03 of said Election Code as amended, and to have Appellant's name printed as the name of such candidate on the Official Ballot of and for the General Election to be held in this State November 6, 1962. And on and at all times since July 2, 1962, it was, and has been, and is Appellee's absolute duty so to certify Appellant's name.

Although, the Secretary of State was requested on July 2, 1962, to instruct the County Clerk of Harris County, Texas, to have the name of Buck C. Miller printed in the independent column, under the title of Judge of the Probate Court of Harris County, Texas, on the official ballot at the next General Election to be held for that position on November 6, 1962. P. Frank Lake, Secretary of State, of the State of Texas, forwarded to Buck C. Miller, his letter, denying said application that the name of Buck C. Miller, of Harris County, Texas, be printed on the General Election Ballot as an independent candidate for Judge of the Probate Court of Harris County, Texas, and the said P. Frank Lake, has advised the said Buck C. Miller that his name will not be certified by his office to be placed on the ballot for the general election to be held on November 6; 1962, as an independent candidate or non-partisan candidate for the office of Judge of the Probate Court of Harris County, Texas.

The Secretary of State refusal to certify the appellant's name to be printed on the general ballot for Judge of the Probate Court of Harris County, Texas, was threefold:

(1) That the office of Probate Judge is a county office and that Appellant's application should have been filed with the County Judge of Harris County, Texas, under Art. 13.53 Election Code.

(2) That appellant had not met the requirements of Section 3 of Art. 1347a of the Election Code.

(3) That appellant voted at the primary election at which the Democratic Party nominee for office of Probate Judge of Harris County was selected.

Whereupon the appellant filed his petition for Writ of Mandamus to require the Secretary of State to issue his instructions to the County Clerk of Harris County, Texas, to have the name of Buck C. Miller, placed and printed upon the official ballot to be prepared for and to be voted at, the general election to be held in Harris County, Texas, on the 6th day of November, 1962, to become a non-partisan or independent candidate for Judge of the Probate Court of Harris County, Texas, in the Supreme Court of Texas.

The Supreme Court overruled the appellant's motion for leave to file the petition for mandamus and appellant's motion for rehearing was overruled both without a written opinion being filed.

Statement

V.A.T.S. Election Code, Articles 13.50, 13.53 and 14.01 were directly attacked, on their face as applied as being vague, ambiguous and discriminatory and in violation of Art. 1, Section 3 of the Constitution of Texas and of the Fourteenth Amendment to the Constitution of the United States. This question was raised in the appellant's trial pleadings (Petition For Mandamus, p. 9, 55).

V.A.T.S. Election Code, Articles 13.12 and 13.47a were directly attacked on their face as being arbitrary, capricious, wilful and discriminatory, and are vague and indefinite and are in violation of Art. 1, Section 3, of the Consti-

tution of Texas and the 14th Amendment to the Constitution of the United States. This question was raised on the appellant's trial pleadings (Petition For Mandamus, pp. 11-12).

The question whether Due Process of Law under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Art. 1, Section 3 of the Constitution of Texas required the State of Texas, when it had enacted legislation for independent or non-partisan candidates to run for Public office required such law to be clear, definite, and not discriminatory in order that a person may seek to be elected to public office at an election conducted pursuant to legal authority was raised in the appellant's trial pleadings (Petition For Mandamus, p. 55).

The Questions Are Substantial

The questions raised on this appeal are substantial, important and are of great public interest.

In the case of *Brewster v. Massey*, 232 S.W. 2d 678, the Supreme Court of Texas discussed at length the case of *Love v. Wilcox*, 28 S.W. 2d 515 Supreme Court of Texas and said "No questions could arise of wider public interest or of graver importance to the state than those involving abridgment of rights of citizens to participate in government through the selection of those who may become public officials by means of party nominations." The Court further held in the *Wilcox* case that there was no other adequate remedy other than by petition for mandamus. The Supreme Court of Texas was urgently requested to write a written opinion discussing the same questions presented by this appeal, but refused. A person has a vested right to become a candidate for public office.

Reasons For Granting The Writ

The only reasons it is contended that Appellant could not have his name placed on the official ballot for such position are as follows:

First Point

(a) That the application should have been filed in the office of the County Judge of Harris County, Texas, instead of with Appellee, Secretary of State.

Appellant states that such contention should be rejected because the provisions of Articles 13.50, 13.53 and 14.01 of the Election Code are so confusing, vague, ambiguous, and discriminatory, especially in Harris County, Texas, in that the territorial jurisdiction of the Probate Court of Harris County, Texas, is equal to each and every District Court, Courts of Domestic Relations, and the Senatorial District of Harris County, Texas, and its territorial jurisdiction exceeds that of both Congressional Districts of Harris County, Texas; and under the plain provisions of Article 14.01, each and every District Court, Court of Domestic Relations, State Senatorial District and Congressional District is a "county office"; but that the judiciary of the State of Texas has held that such offices are "district offices" and require the nomination of an independent candidate therefore by only five hundred (500) qualified voters, whereas the provisions of Article 13.53 require the nomination of an independent candidate for a County office by qualified voters equal at least to five (5%) of the entire vote cast in the county at the last general election; that such requirements for an independent candidate for a county office in Harris County, Texas, is clearly discriminatory in that there were over 200,000 votes cast in

Harris County, Texas, at the last general election; and an independent candidate would be required to have more than 10,000 qualified voters to name him as a non-partisan or independent candidate. Further, such voters would have to be persons who did not vote in the Democratic Primary on May 5, 1962, and they would have to make an oath that they had not participated in any primary which had nominated a candidate for the office to which they desired to nominate the non-partisan or independent candidate.

Such discrimination is in violation of Article 1, Section 3 of the Constitution of Texas and of the 14th Amendment to the Constitution of the United States.

Appellant had over 700 signatures, which were far short from five (5%) that would be required under Art. 13.53 of the Election Code.

Appellant contends that this statute is void because of discriminatory legislation and will not stand the test of due process of law, in that it requires more of an independent candidate than Art. 13.50, Election Code, which provides that in no event shall more than 500 qualified endorsers ever be required for filling an office that is voted upon by less than all the voters of the State.

The Courts of Texas have already construed Art. 13.53, as requiring five (5%) of the voters who voted at the last General Election endorse an Independent Candidate in order that his name be placed on the ballot. *Dancy v. Hunt*, 294 S.W. 2d 159, Ref. N.R.E.; *Greenwood v. City of El Paso*, Tex. Civ. App., 186 S.W. 2d 1015; and Attorney General's Opinion No. V-1513, dated August 28, 1952. *Austin v. City of Alice*, 193 S.W. 2d 290.

Under due process of law both State and Federal Art. 13.53 Election Code must fall as a matter of law and the Supreme Court of Texas can write nothing into that

Art. to prevent its failing. In the case of *Gilmore v. Waples*, 188 S.W. 1037, the Supreme Court of Texas, said that a court can only observe a statute and enforce it; that it cannot apply omissions in laws. That a court will try to determine the intent of the legislature, but can write nothing into the law to cure defects or omissions. It would be a futile thing to require this appellant to comply with the terms of an unconstitutional statute, which falls and fails as a matter of law and as such, Appellant would have no duty to file his application to get on the ballot in the office of the County Judge. *City of Houston v. State*, 171 S.W. 2d 203; *Board of Trustees, Etc. v. Farrar*, 236 S.W. 2d 663, and would have no duty to file his intent to run for office as provided by 13.47a Election Code for the same reason.

Art. 13.53 Election Code failing as a matter of law the requirements of it would also fall and Appellant would have no duty to file his application nor notice of intent to run for office in the office of the County Judge of Harris County, Texas, as required by such Art., but could proceed under Art. 13.50 pertaining to independent candidates. The law will not require the doing of a futile thing. *Sterrett v. Morgan*, 294 S.W. 2d 201. Due process of law requires the State of Texas to provide a law that is not discriminatory that will permit an independent candidate to have his name placed on the official ballot, and this Appellant has met all the requirements of Articles 13.50, 13.51, and 13.52, of the Election Code, the only valid statute pertaining to independent candidates *Weatherly v. Fulgham*, Supreme Court of Texas, 271 S.W. 2d 938.

Article 13.53 of the Election Code is vague, uncertain, indefinite and discriminatory and a person attempting to qualify as an independent candidate for office thereunder

is unable to do so and is deprived of the right to seek to be elected to public office at an election conducted pursuant to legal authority. *Sterrett v. Morgan*, 294 S.W. 2d 201. A person has a legal right to try and seek public office and the law should provide a clear definite understandable manner that is not discriminatory. A failure by the State of Texas to so provide denies a person of Due Process of Law, so as to render unconstitutional the Articles of the Election Code pertaining to independent candidates under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and Article 1, Section 3 of the Constitution of Texas. *Vernon's Texas Constitution*, Volume 1.

Clearly the legislature has discriminated against an independent candidate required to proceed under Article 13.53 of the Election Code.

Further in some cases an independent candidate in some District offices would have several counties to get the five hundred votes while under 13.53 the Election Code an independent candidate would be able to get the endorsement of voters from only one county. Here again the legislature has discriminated against the independent candidate who must meet the requirements of Article 13.53 of the Election Code. 12 *Tex. Jur. 2nd, Constitutional Law*, Section 101, Page 450, Equal Protection Under The Law; Discriminatory Legislation.

In the case of *Rucker v. State*, 342 S.W. 2d 325, the court said, (2, 5) "Article 1, Section 3, of the *Constitution of Texas, Vernon's Ann. St.*, and the *14th Amendment to the Constitution of the United States* secure all persons similarly circumstanced equal protection under the laws of this State or any subdivision thereof. . . .

Unequal treatment of persons under a state law which is founded upon unreasonable and unsubstantial classification constitutes discriminatory state action and violates both the state and federal constitutions.

The Appellant in the Petition for Mandamus set up all of the statutes and Articles of the Constitution of Texas, creating the different Courts of Harris County.

One of the reasons for discussing the different Courts of Harris County is to show that all of such courts whether District Courts or County Courts are Judicial Courts performing approximately the same function and covering the same territory and no substantial reason exists for the Legislature requirements of the number of persons needed to endorse an independent candidate for public office.

In Harris County the District Courts have jurisdiction only in Harris County, Texas, as do our five (5) Criminal District Courts and our three Courts of Domestic Relations. Clearly none of these courts operate in as many as two (2) counties, but under the definition of Art. 14.01 of the Election Code all of such courts would be classified as being a "county office", in that to be a "district office", under the Code such office must be filled by the choice of the voters residing in more than one (1) county. See definitions Art. 14.01, Election Code.

Nothing can be determined from the kind of court set forth in Article 13.50 of the Election Code because the kind of office according to the code is not determined by the kind of court but is determined by the manner in which the office is filled by the voters of the county. These Articles are in conflict with each other, confusing, misleading and make it impossible for an independent candidate to comply with the Election Code. Will the provisions of Article 13.50 of the Election Code providing in that

in no event will more than five hundred (500) signatures ever be necessary for any office that is not filled by all the voters of the State, be read into Article 13.53 of the Election Code? The case of *Greenwood v. City of El Paso*, supra, stipulated it into the case and the case of *Dancy v. Hunt* and the Attorney General Opinion supra did not read it into the case. We cannot determine the intention of the legislature and the cases are inconsistent.

Not withstanding the definition set out in Art. 14.01 of the Election Code we find the case of *Williams v. Huntress*, 272 S.W. 2d 87, the Supreme Court of Texas has added to the confusion of how to proceed under the Election Code by holding "Mr. Spears contends that in Art. 14.01 a county office is defined as an office elected by the voters of one county only. Since this court is for a one-county district, he contends it is a county office. In the recent case of *Carpenter v. Longuemare*, Tex. Sup., 270 S.W. 2d 457, this court held (the writer dissenting) that the definitions contained in Art. 14.01 were not controlling of all portions of the Code. It is settled that a one-county District Court is a district office in spite of the definition now contained in Art. 14.01, Election Code, V.A.T.S. *Hamilton v. Monroe*, Tex. Civ. App., Waco, 1926, 287 S.W. 304, affirmed 116 Tex. 153, 287 S.W. 306; *Bounds v. McCallum*, 122 Tex. 416, 52 S.W. 2d 1047. Consequently, we now hold that a special one-county District Court is a district office. . . .

Second Point

(b) Article 13.47a, Section 3, attempts to make it a condition precedent to having a non-partisan or independent candidate's name printed on the official ballot under Articles 13.50 and 13.53 of the Election Code, in addition

to the requirements of those two said Articles, that there be filed with the person with whom the written application must be filed an affidavit, duly acknowledged by the person desiring his name to be placed on the ballot as a non-partisan or independent candidate, his occupation, county of residence, post office address, age, and the office for which he intends to run, and that said affidavit be filed at the same time the request under Article 13.12 of the Election Code must be filed.

Appellant states that the provisions of Article 13.47a of the Election Code relating to non-partisan or independent candidate are clearly discriminatory in that such non-partisan or independent candidate must file his intention to run not later than the 1st Monday in February, preceding the primary of candidates running for office in the primary of a political party, and that such provisions clearly deprive qualified voters, who have not voted in any primary of a political party from nominating a non-partisan or independent candidate for office at a General Election, in that if no person files an affidavit as a non-partisan or independent candidate at the time required by Article 13.47 and 13.12 of the Election Code, then the provisions of said Articles have effectively prohibited and deprived the qualified voters, who have not voted in a primary, from nominating a non-partisan or independent candidate for office to be voted on at the next General Election.

Further the requirements of Articles 13.12 and 13.47 of the Election Code when construed in connection with Article 13.50 and 13.53 of the Election Code, as they apply to a non-partisan or independent candidate, are discriminatory and place a greater burden on the non-partisan or independent candidate, than the requirements pertaining to a candidate who offers himself as a candidate for public office on a political party primary.

That such provisions pertaining to non-partisan or independent candidates are arbitrary, capricious, wilful and discriminatory, and are vague and indefinite and are in violation of Article 1, Section 3, of the *Constitution of Texas* and the 14th Amendment to the *Constitution of the United States.*

Now under Articles 13.50 and 13.51 of the Election Code the people had a right to nominate an independent candidate for office and the candidate could if he desire to accept the nomination do so by complying with Art. 13.52 of the Election Code by consenting to run.

The Legislature has deprived the people of a constitution right to nominate such independent candidate for public office by taking away their right to nominate in that the Legislature has now limited the right to have one's name placed on the ballot as an independent candidate only if the candidate makes the affidavit provided for by Articles 13.47a and 13.12. Further Articles 13.47a and 13.12 discriminate against the independent candidate in that he is required to do more than the candidates of other parties as he is also required to consent to run as required by Article 13.52 of the Election Code, after being nominated.

The Supreme Court of Texas, has held that in *Westerman v. Mims*, 227 S.W. 178, that the people have a fundamental right to nominate an independent candidate for office. Art. 13.47a, which requires an independent candidate to file his affidavit of intent to run for office by the first Monday in February, is thus unconstitutional in depriving the people of the right to nominate an independent candidate for office.

If this Court should hold that Art. 13.47a is constitutional and even though it is admitted that appellant did not file his intent to run by the 1st Monday in February,

1962, due process of law, nevertheless, would require that this appellant's name be placed on the ballot, because had he complied with Art. 13.47a; Art. 13.53 of the Election Code fails as a matter of law as do the requirements to file the application and also the notice of intent to run for office with the County Judge and it would have been impossible for this Appellant to have complied with such statute and have his name placed on the ballot, and the law will not require the doing of a futile thing. *Sterrett v. Morgan*, 294 S.W. 2d 201. The federal rule consistently recognizes that the law and equity never require a vain act. *School Board of City of Charlottesville v. Allen*, 240 F. 2d 59, 63, 64 (4th Cir. 1956); *Gibson v. Board of Public Instruction*, 246 F. 2d 913, 914 (5th Cir. 1957).

Further due to the definitions of the Election Code Article 1 1 defining county offices and district offices the legislature has created confusion and make it impossible for an independent candidate to know whether he should file his application with the County Judge or with the Secretary of State.

The court should hold that my failure to comply with Articles 13.12 and 13.47a should not prevent the Secretary of State from being required to certify my name to the County Clerk of Harris County, Texas.

It is apparent that I could not have complied with the Election Code due to its misguiding, misleading, confusing and discriminatory requirements.

The Supreme Court of the United States in the case of *Baker v. Carr*, 82 S. Ct. 691 (1962) held that the Plaintiffs and others similarly situated were denied the equal protection of the law accorded them by the Fourteenth Amendment of the Constitution of the United States by virtue of the debasement of their votes.

Further the legislature has discriminated against the independent candidate as provided by Article 6.04 of the Election Code pertaining to death or declination in which the name of a new nominee may be provided by permitting the proper committee of the party to name a nominee to the position being sought without the nominee having to file his affidavit and request to go on the ballot as provided by Articles 13.12 and 13.47a of the Election Code. This is not permitted on behalf of an independent candidate or persons attempting to place the name of an independent candidate on the official ballot.

The case of *Gilmore v. Waples, Supreme Court*, 188 S.W. 1037, is authority that the people's right to run candidates for public office must not be unreasonably interfered with by the legislature, the court saying, "it is the undoubted right of a political party to make nominations for the elective officers of the people. The legislature has the authority to prescribe reasonable methods to be employed for the purpose; but it does not possess the power to absolutely prohibit any nomination being made. Such an attempt would constitute an arbitrary interference with the liberty of the people to freely associate themselves for the purpose of expressing such choice for their elective offices as they might select and for reasons they might see fit. "The liberty of the electors in the exercise of the right vested in them by the Constitution to choose public officers on whatever principle or dictated by whatever motive they see fit, unless those motives contravene common morality, and are therefore criminal, cannot be denied. It seems to me as absolute as the right to pursue any trade or calling, and therefore their right to associate and organize for that purpose is equally great." *Coffey v. Democratic General Committee*, 164 N.Y. 335, 58 N.E. 124, 51 L.R.A. 680.

The legislature has taken away from the people their right to run independent candidates for office by its enactment of Articles 13.47a and 13.12 permitting only a person who files the affidavit required to have his name placed on the ballot. Under Article 13.50, 13.53 Election Code no such requirement is made and the people have a vested right to nominate an independent candidate and if he consents to run as provided by Article 13.52 of the Code his name should be placed on the ballot.

Third Point

(c) It is admitted that Buck C. Miller voted in the Democratic Primary on May 5, 1962, and in the Second Primary on June 2, 1962, in which Judge Clem McClelland was nominee of the Democratic Party for Judge of the Probate Court of Harris County, Texas. At that time nothing was known by the public or appellant about the misconduct of the said Clem McClelland; all of such misconduct having become apparent since June 2, 1962. Does the said Buck C. Miller still owe a moral obligation to support Clem McClelland the nominee of the Democratic Party? Appellant would show that he is no longer morally obligated to support Clem McClelland, the nominee of the Democratic Party for Judge of the Probate Court of Harris County, Texas, due to the fact that appellant voted in the Democratic Primary on May 5, 1962, in that since having voted in such primary it has become apparent that Clem McClelland has failed in his duties as a Judge and has forfeited his right to the moral support of the said appellant by having had a suit filed against him in cause number 596,784, In The 61st Judicial District Court of Harris County, Texas. In such petition it is alleged that on June 20, 1962, the Grand Jury of Harris County, Texas, re-

turned true bills of indictments against the said Clem McClelland charging and indicting him along with others as principals with the intent to defraud the heirs and distributees interest in the estates under the control of Clem McClelland and for converting to their own use money belonging to the estates.

The suit filed against him in cause number 596,784, is based on these indictments and charge him with "Official Misconduct" under Article V, Section 24 of the *Constitution of Texas* and as that term is defined under Article 5973 *V. A. C. S.* He is also charged with "incompetency" under Article V, Section 24 of the *Constitution of Texas*, and as that term is defined by Article 5972, *V. A. C. S.*

The cases have based the refusal to issue the mandamus on the ground that the appellant did owe a moral obligation to support the nominee of the party in which primary he had voted, and thus did not come into court with clean hands. *Westerman v. Mims*, 227 S.W. 178, Supreme Court of Texas, said:

> "We do not say that circumstances might not arise under which one who had participated in a primary would be relieved of the moral obligation which is ordinarily incurred not to undertake the nominee's defeat."

Just cause was alleged and proved by appellant (Petition for Mandamus, pp. 12-14, 63-65, 70-73) as a matter of law that appellant is no longer morally obligated not to undertake the defeat of the Democratic Party Nominee, Clem McClelland, for Judge of the Probate Court of Harris County, Texas, due to the fact that said appellant did vote in the Democratic Party Primary on May 5, 1962, and in the Second Democratic Primary runoff by voting on June 2, 1962.

Several courts in Texas have held that the right to run for public office is a judicial question and not a political one. *Sterrett v. Morgan*, 294 S.W. 2d 201. *Gilmore v. Waples*, 188 S.W. 1037, Supreme Court. The Appellant has no other remedy at law and will suffer great and irreparable injury unless Appellee is compelled to perform his ministerial duties. This is the remedy provided by the law of Texas for Appellant and if the law gives a person a right it must also provide an adequate remedy to enforce his right.

We find the cases holding that a plain ministerial duty to perform must be alleged and proved before a Petition for Mandamus will lie. However, such language does not mean that merely because a great and difficult task is involved that would require an exhaustive effort to determine if the duty to perform is owed that the Petition for Mandamus will be refused. It is true that Appellant is confronted by serious legal questions some involving the constitutionality of statutes.

Such questions do not permit the Supreme Court of Texas the right not to determine the constitutionality of such questions, merely because they are extremely difficult, for the Supreme Court of Texas, has held that the Appellant may in a proper case, attack the constitutionality of the statute by way of Petition for Mandamus. See *Metropolitan Life Insurance Company v. Love*, 101 Tex. 444, 108 S.W. 821, 1157 (wherein the court said that it might be that the Relator would be entitled to mandamus in such circumstances); and *Jones v. McMahan*, 30 Tex. 719 (wherein the validity of a statute relied on by the Respondent was attacked, and it was held to be unconstitutional).

See *Holman v. Pabst*, (Civ. App.) 27 S.W. 2d 340, holding that in proceedings to compel the calling of an election to determine whether or not live stock should be permitted to run at large, members of the commissioner's court had the right to question the constitutionality of the statute providing for such elections. See also, 28 *Tex. Juris., Mandamus*, Section 20, Questioning Constitutionality of Statutes, Page 549.

The only reasons why the Appellant's name should not be placed on the ballot are technical reasons that will and must fall when tested by Art. 1, Section 3, of the State Constitution and the issue of due process of law, and equal protection of the law as guaranteed under the Fourteenth Amendment to the United States Constitution.

Due process of law is involved in this case and will not permit some technical reason from preventing justice to prevail.

Conclusion

Wherefore, appellant prays that, after due notice and hearing, he be granted by this Court a peremptory mandamus order, or writ of mandamus, commanding appellee, as Secretary of State, to forthwith certify, as required by Article 1.03 of said Election Code, as amended, the name of Buck C. Miller, of Harris County, Texas, to be printed on the Official Ballot for the General Election of November 6, 1962, in the column for independent candidates, as the name of a candidate for the office of Probate Judge of Harris County, Texas, and it issue such instructions to the Supreme Court of Texas, to carry out its order.

That Appellant prays this Honorable Court to advance this cause out of its regular order and set the same down for a hearing at the earliest possible date in order that the

same may be heard and determined, and if the relief prayed for is granted, in time to have the name of Buck C. Miller printed on the official ballot in Houston, Harris County, Texas, in time for the election to be held on November 6, 1962. Time is of the essence in that absentee voting will commence twenty (20) days prior to that date, after which time the questions presented by Appellant will be moot. That it be ordered that no motion for rehearing will be entertained herein; and that Appellant have any and all relief proper in the premises, and judgment for costs herein.

Respectfully submitted,

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I, John J. Herrera, attorney for Appellant, hereby certify that on the 29th day of August, 1962, I served a copy of this brief on P. Frank Lake, Secretary of State of the State of Texas, Capitol Station, Austin 11, Texas, and to his attorney Will Wilson, Attorney General of Texas, Capitol Station, Austin 11, Texas, by mailing copies in duly addressed envelopes, with first class postage prepaid, at their respective addresses.

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APPENDIX "A"

No. A-9159 — August 6, 1962

BUCK C. MILLER, Relator
vs.
P. FRANK LAKE,
SECRETARY OF STATE,
Respondent

IN THE
SUPREME COURT
OF TEXAS

In the case of Miller v. Lake, Secretary of State, No. A-9159, motion for leave to file petition for writ of mandamus was this day overruled.

APPENDIX "B"

No. A-9159 — August 20, 1962

BUCK C. MILLER, Relator
vs.
P. FRANK LAKE,
SECRETARY OF STATE,
Respondent

IN THE
SUPREME COURT
OF TEXAS

Rehearing in the case of Buck C. Miller v. P. Frank Lake, Secretary of State, No. A-9159, was this day overruled.

Office-Supreme Court, U.S.
FILED
SEP 29 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 415

BUCK C. MILLER,
Appellant,

v.

P. FRANK LAKE, SECRETARY OF STATE,
Appellee.

On Appeal for Mandamus

On Appeal from the Supreme Court of Texas

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term. 1962

No. 415

BUCK C. MILLER,
Appellant,

v.

P. FRANK LAKE, SECRETARY OF STATE,
Appellee.

On Appeal for Mandamus

On Appeal from the Supreme Court of Texas

BRIEF OF RESPONDENT IN OPPOSITION

Opinion Below

The Supreme Court of Texas refused Appellant the right to file his Petition for Mandamus on August 6, 1962. That Court overruled Petitioner's Motion for Rehearing on August 20, 1962. These orders are shown in Appellant's Jurisdictional Statement filed in this cause at page 29.

Jurisdiction

The Supreme Court's order overruling Petitioner's Motion for Rehearing was entered on August

20, 1962. Petitioner's application was filed in this court on September 5, 1962.

This Court has jurisdiction to review this case upon Writ of Certiorari under Title 28, U.S.C., Sec. 1257(2). This Court also has jurisdiction by direct appeal under Title 28, U.S.C., Sec. 2103 and 2104.

Hamilton v. University of California, 293 U.S. 245.

Williams v. Bruffy, 96 U.S. 176.

Constitutional and Statutory Provisions

Most of the constitutional and statutory provisions involved are set out by Appellant. However, all of these provisions which Appellee considers applicable to its reply are set out in the Appendix hereto. These are Texas Constitution, Art. V, Sec. 1, Articles 198, 199 and 1970-110a of Vernon's Annotated Civil Statutes of Texas, and Articles 13.12, 13.29, 13.31, 13.32, 13.47a, 13.50, 13.51, 13.52, 13.53 and 14.01 of the Texas Election Code.

Question Presented for Review

Is a substantial Federal constitutional question raised by a complaint which attacks the constitutionality of related Texas statutes which prescribe the requisites of a petition of an independent candidate to have his name placed on the ballot for a county office at the general election to be held in Texas on November 6, 1962?

Statement

Appellant asks this Court for a writ of mandamus to require Appellee to certify his name as an independent candidate for the office of Probate Judge of Harris County, Texas to be printed on the ballot for the general election to be held throughout that county on November 6, 1962. Appellee contends that he has no authority to make this certification because he can certify only as to state and district offices (Art. 13.50 Texas Election Code) and that the office Appellant seeks is a county office (Art. 13.53 Texas Election Code).

Appellant asks relief under the same statutes he asks this court to declare unconstitutional.

Reasons for Not Granting the Application

The statutes under consideration are neither discriminatory nor ambiguous. They have been interpreted by the appellate courts of Texas adversely to Appellant's allegations of their ambiguity. Appellant would have this Court equate the constitutional right of voters to vote for whom they choose with his alleged constitutional right to have his name appear on the ballot as an independent candidate.

I.

Appellant does not allege nor offer evidence to show either that the number of voters required by Art. 13.53, Texas Election Code, to sign a written application for County Judge are not available or of such a large number as to work an unconstitutional hardship upon him. This Court has held that

before it will pass upon questions of constitutional law of far-reaching importance that the facts essential to their decision should be definitely found by the lower courts upon adequate evidence. *Borden's Farm Products Co., Inc. v. Baldwin*, 293 U.S. 194 (1934); *Polk Company v. Glover*, 305 U.S. 5 (1938). This Court has further held that decision by it of the issue of discrimination should be withheld pending definitive construction of a state statute by the courts of that state. *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941).

II.

The Texas Legislature has not exceeded its broad constitutional discretion in prescribing the requirements of a petition to nominate candidates for the elective public office which Appellant seeks based upon territory and number of voters. *MacDougall v. Green*, 335 U.S. 281 (1948).[1] Legislative classifica-

[1] This case held that the requirement of the Illinois Election Code which required a petition to form, and to nominate candidates for, a new political party be signed by at least 25,000 qualified voters, including at least 200 from each of at least 50 of the 102 counties in the State. Appellant therein alleged that 52% of the State's registered voters resided in Cook County alone, 87% in the 49 most populous counties, and only 13% in the 53 least populous counties. He sought to enjoin enforcement of the requirement of at least 200 signatures from each of the least populous 50 counties. The Court held that the requirement attacked did not violate the due-process, equal-protection or privileges-and-immunities clause of the 14th Amendment or other constitutional provisions.

tion and differentiation in the requirements of a petition for the office of Probate Judge of Harris County and other judicial offices whose territorial bounds and also Harris County is presumptively

valid. Appellant has not discharged the burden upon him of presenting evidence or lower court findings to support a determination in this Court that such differentiation does not rest upon any reasonable basis. *Borden's Farm Products Co., Inc. v. Baldwin* (supra). The scope allowed to state legislatures with reference to the state elective processes is very broad. *Smith v. Allwright*, 321 U.S. 649 (1944) (at p. 657); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952).

III.

The Probate Court of Harris County is a "county office" within contemplation of Art. 13.53 of the Texas Election Code and not a "judicial district office" within contemplation of Art. 13.50 of that Code. Appellant has not complied with the statutory requirements to have his name placed on the ballot. Art. 13.53 is not ambiguous; it has been construed by Texas courts adversely to Appellant's position.

A) Appellant should have filed his petition with the County Judge of Harris County instead of with Appellee, who is Secretary of State of Texas. He did not follow the decision of the court in *Sterrett v. Morgan*, 294 S.W.2d 201 (Tex. Civ. App. 1956) which held that the petition of one who sought his name to be placed on the general election ballot in Dallas County for the office of Judge, County Court of Dallas County at Law No. 2, should be filed with the County Judge of that county.

Appellant contends that because the office of Judge of the Probate Court of Harris County is a

"judicial" office under Article V, Sec. 1 of the Texas Constitution that it is a "judicial district office" under Art. 13.50 of the Texas Election Code. Pursuant to his reasoning, both the Commissioners Courts and Courts of Justices of the Peace, also named in this constitutional provision as "judicial" offices would be "judicial district offices" within Art. 13.50 of the Election Code. If so, independent candidates for these two offices would be required to file their petitions to have their names printed on the ballot with the Secretary of State under Art. 13.50, instead of being required to file such petitions with the County Judge under Art. 13.53 of the Election Code. Members of the Commissioners Courts and Justices of the Peace each are elected from a "precinct," which is a geographical and political subdivision of a county. Contrary to Appellant's theory, the case of *Dancy v. Hunt*, 294 S.W.2d 159 (Tex. Civ. App. 1956, error ref. n.r.e.) held that one who sought to have his name placed on the general election ballot as an independent candidate for county commissioner (a member of the Commissioners Court) properly filed his petition with the County Judge pursuant to Art. 13.53 of the Election Code.

Art. 13.50 of the Texas Election Code wherein it relates to a "supreme judicial" and a "judicial district office" clearly refers to the supreme judicial districts created by Art. 198, Vernon's Annotated Civil Statutes of Texas, and to the judicial districts created by Art. 199 of these statutes.

Article 1970-110a, Vernon's Annotated Civil Statutes of Texas, creates the Probate Court of

Harris County, for the judge of which Appellant aspires to be certified as a candidate. All the provisions of this article clearly show that this Court is a county and not a district court. Sec. 1 of this article denominates this court as a County Court. Sec. 2 makes its jurisdiction concurrent with the jurisdiction of the County Court of Harris County in probate matters. Sec. 5 conforms the practice and procedure in and appeals from this court to that provided for other county courts of the State. Sec. 6 gives to the court the same general powers with reference to writs, process and contempt as are given by general laws to County Courts in the State. The interim judge of the court is to be appointed by the Commissioners Court of Harris County (Sec. 8), and any vacancy in the office is to be filled by the Commissioners Court of the county (Sec. 10). The Judge of the court shall conform his official bond and oath to the bond and oath required by County Judges (Sec. 9). The County Judge of Harris County shall act in the absence, disqualification or incapacity of the Judge of the Probate Court (Sec. 11). When neither of these Judges are available then a Special Judge of the Probate Court shall be elected or appointed as provided by the general laws relating to County Courts and to the Judges thereof (Sec. 12). The County Clerk of Harris County is the Clerk of the Probate Court (Sec. 13). The fees of office of the Judge of the Probate Court are the same as provided for the County Judges and the salary paid him is both in the same amount and payable in the same manner as the salary of the

Judges of the County Courts at Law of Harris County.

B) Since the office in question is a county office, there is a lack of necessary parties to this proceeding, in order to confer jurisdiction upon this Court. The County Judge of Harris County (Art. 13.53, Texas Election Code) and County Clerk of Harris County (Arts. 13.29, 13.31 and 13.32, Texas Election Code) are necessary parties to this suit.

C) By Appellant's own admission his Petition to have his name printed on the General Election ballot contained something over seven hundred (700) signatures. (Par. III, page 2, Petition for Mandamus). By Appellant's own admission, there were in excess of 200,000 votes cast in Harris County at the last general election, and five per cent (5%) thereof would be in excess of ten thousand (10,000) signatures required on his petition. His petition is insufficient under Art. 13.53, Texas Election Code.

D) Section 3 of Article 13.47a, Texas Election Code, requires that a candidate under Article 227 [Art. 13.50, Texas Election Code] or Article 230 [Art. 13.53, Texas Election Code], in other words, an Independent candidate, file an affidavit containing certain information, and an announcement of the office for which the candidate intends to run, with the person with whom his petition (written application) is filed, that is either with the Secretary of State under Art. 13.50 or with the County Judge under Article 13.53. Such affidavit of intention to run as an Independent candidate must be

filed with the proper official ". . . at the same time requests under Article 190 [Art. 13.12, Texas Election Code] must be filed." Art. 13.12 of this Code, which governs the filing by candidates who intend to run in party primaries, states in Section 2 thereof that ". . . such request shall be filed not later than the first Monday in February preceding such primary, . . .". Therefore, under Art. 13.47a, Texas Election Code, the affidavit of Independent candidates for any office, the term of which expires on December 31, 1962, must have been filed with the proper official "at the same time" candidates in party primaries file their application to go on the ballot, to-wit, the first Monday in February preceding the primary or not later than February 5, 1962. Appellant has not filed the affidavit required by Art. 13.47a, Texas Election Code, to be filed on February 5, 1962, with either the Secretary of State or the County Judge of Harris County. (Par. VIII, page 6, Petition for Mandamus).

IV.

Appellant may run for the office he seeks at the general election and may be elected by a write-in vote even though his name may not appear on the ballot as an independent candidate. *Cunningham v. McDermett*, 277 S.W. 218 (Tex. Civ. App. 1925 error dism. w.o.j.); *Carpenter v. Longuemare*, 153 Tex. 439, 270 S.W.2d 457 (Tex. Sup. 1954);[2] *Smith v. Allwright* (supra) (at p. 656).

[2] This case holds that write-in ballots must be counted whether voting machines are used or paper ballots are used in the balloting.

Appellant would equate as a Federal constitutional right his privilege upon compliance with the statutes of having his name upon the ballot in the general election and the right of qualified voters to vote at that election for whom they may choose. This distinction is made clear in *Cunningham v. McDermett* (supra) which discusses and distinguishes the holding in *Westerman v. Mims*, 111 Tex. 29, 227 S. W. 178 (Tex. Sup. 1921). This distinction is recognized in *Smith v. Allwright* (supra) (at p. 656).

No discrimination within purview of the United States and Texas Constitutions is made against Appellant in refusing his petition for mandamus on the ground that he voted in the Democratic Primaries of 1962 and that his name may not appear on the general election ballot as an opposing candidate to the nominee made by the Democratic party at those primaries.[3] Appellant admits he voted in

[3] Opinion of the Attorney General of Texas No. WW-1377, released July 12, 1962, sets forth the equities as between those who would have their names upon the general election ballot in the requirements of Sec. 3 of Art 13.47a of the Texas Election Code. In its more pertinent portion that opinion reads:

> "Note that Sec. 3, Art. 13.47a, Election Code, does not affect the procedures laid down in Arts. 13.50 and 13.53. Art 13.47a states that an affidavit of intention to run, containing certain specified information must be filed 'with the person with whom the written application must, thereunder [Arts. 13.50 and 13.53], be filed,' and such affidavit is 'in addition to the requirements of those two (2) Articles.' After filing the affidavit of intention to run on or before the first Monday in February, the Independent candidate still has until 30 days after the Second Primary under

these primaries (Par. VIII, page 6, and Par. IX, page 12 of his Petition for Mandamus filed in the Supreme Court of Texas). He voluntarily participated in the Democratic primaries and voluntarily assumed the settled legal obligation to support the nominee of the party resulting from those elections. *Westerman v. Mims* (supra); *Rummler v. Reavley*, 156 Tex. 138, 293 S.W.2d 638 (Tex. Sup. 1956);

Arts. 13.50 and 13.53 in which to file his petition signed by the required number of voters.

"Heretofore, it has been possible for a prospective Independent candidate to wait until both the First and Second Primaries were over in order to determine whether he wanted to face in the General Election one or more party candidates who had been selected in the party primaries. Now, a candidate for office as an Independent candidate must file at the same time party candidates must file. Thereafter, the party candidate makes his race in the primary elections or at the party convention (if his party is not required to hold a primary election), while the Independent candidate goes about rounding up signatures for his petition. In some counties in Texas, it has been the practice for all candidates to run as Independent candidates. The 1962 General Election is the first General Election to be affected by Art. 13.47a, and the effect of this act was not noted by some candidates until it was too late to comply with the provision calling for the affidavit of intention to run to be filed by the first Monday in February. This is unfortunate, but the statute is state-wide in its application, without regard to the practice which has been heretofore followed. Sec. 3, Art. 13.47a states that the filing of the affidavit by the first Monday in February is 'a condition precedent to having a candidate's name printed on the official ballot' as an Independent candidate. We hold, therefore, that where the race is to be made for an office, the term of which begins on January 1, 1963, Independent candidates must have filed the affidavit of intention to run required in Sec. 3, Art. 13.47a, Election Code, on or before the first Monday in February, 1962, in order to have their names printed on the General Election ballot."

Smith v. Allwright (supra) (at pages 654-657); *Ray v. Blair*, 343 U.S. 214 (1952) (at pages 230-231).

Conclusion

Appellee submits that Appellant does not submit a substantial federal question and that his Petition should be in all things denied and dismissed.

Respectfully submitted,

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SERVICE

I, William E. Allen, Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do now enter my appearance in the Supreme Court of the United States in the above captioned cause, in behalf of the Appellee. I do further certify that a copy of the foregoing Brief has been forwarded by United States Mail, First Class, Postage Prepaid, to each of Appellant's attorneys, Mr. John J. Herrera, 407 Scanlan Building, Houston 2, Texas, and Mr. Philip M. Shafer, 407 Scanlan Building, Houston 2, Texas.

William E. Allen

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APPENDIX

Constitutional and Statutory Provisions

Texas Constitution, Art. V, Sec. 1:

> "The judicial power of this State shall be vested in one Supreme Court, in Courts of Civil Appeals, in a Court of Criminal Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law.
>
> "The Criminal District Court of Galveston and Harris Counties shall continue with the district jurisdiction and organization now existing by law until otherwise provided by law.
>
> "The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto."

Art. 198, Vernon's Annotated Civil Statutes of Texas (pertinent portion):

> "This State shall be divided into eleven (11) Supreme Judicial Districts, composed of the following named Counties for the purpose of constituting and organizing a Court of Civil Appeals in each of the several Supreme Judicial Districts as follows, to-wit:
>
> "First: Trinity, Walker, Grimes, Burleson, Washington, Waller, Harris, Chambers, Austin, Colorado, Lavaca, Jackson, Matagorda,

Wharton, Brazoria, Fort Bend, Galveston, Anderson, and Houston.

. . . ".

Art. 199, Vernon's Annotated Civil Statutes of Texas (pertinent portion):

"The judicial districts of the State shall be composed of the following named counties, and the terms of court in said districts shall be held therein each year, as follows:

. . .

"Harris County shall constitute the 11th, 55th, 61st, 80th, 113th, 125th, 127th, 129th, 133rd, 151st, 152nd, and 157th Judicial Districts. . . . ".

Art. 1970-110a, Vernon's Annotated Civil Statutes of Texas:

"Section 1. There is hereby created a County Court to be held in and for Harris County, to be called the Probate Court of Harris County.

"Sec. 2. The Probate Court of Harris County shall have the general jurisdiction of a Probate Court within the limits of Harris County, concurrent with the jurisdiction of the County Court of Harris County in such matters and proceedings. It shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis and common drunkards, grant letters testamentary and of administration, settle accounts of executors, transact all business appertaining to deceased persons, min-

ors, idiots, lunatics, persons non compos mentis and common drunkards, including the settlement, partition and distribution of estates of deceased persons, lunacy proceedings and the apprenticing of minors as provided by law.

"Sec. 3. On the first day of the initial term of said Probate Court of Harris County there shall be transferred to the docket of said Court, under the direction of the County Judge and by order entered on the Minutes of the County Court of Harris County, such number of such proceedings and matters then pending in the County Court of Harris County as shall be, as near as may be, one-half in number of the total of all of same then pending, and all writs and processes theretofore issued by or out of said County Court of Harris County in such matters or proceedings shall be returnable to the Probate Court of Harris County as though originally issued therefrom. All such new matters and proceedings filed on said day, or thereafter filed, with the County Clerk of Harris County, irrespective of the Courts or Judge to which the matter or proceeding is addressed, shall be filed by said Clerk alternately in said respective Courts in the order in which same are deposited with him for filing, beginning first with the County Court of Harris County. The County Judge of Harris County, in his discretion, may, by an order entered upon the Minutes of the County Court of Harris County, on or after the first day of the initial term of said Probate Court of Harris County, transfer to said Probate Court any such matter or proceeding then or thereafter pending in the County Court of Harris County, and all processes extant at the time of such transfer shall be re-

turned to and filed in the Court to which such transfer is made and shall be as valid and binding as though originally issued out of the Court to which such transfer may be made.

"Sec. 4. The County Court of Harris County shall retain, as heretofore, the powers and jurisdiction as a Probate Court with respect to all matters and proceedings of such nature other than those provided in Section 3 of this Act to be transferred to and filed in the Probate Court of Harris County. The County Judge of Harris County shall be the Judge of the County Court of Harris County, and all ex-officio duties of the County Judge of Harris County, as they now exist, shall be exercised by the County Judge of Harris County, except in so far as the same shall by this Act expressly be committed to the Judge of the Probate Court of Harris County. Nothing in this Act contained shall be construed as in anywise impairing or affecting the jurisdiction of the County Court at Law of Harris County, or of the County Court at Law No. 2 of Harris County.

"Sec. 5. The practice and procedure in the Probate Court of Harris County shall be the same as that provided by law generally for the county courts of this State; and all Statutes and laws of the State, as well as all rules of court relating to proceedings in the county courts of this State, or to the review thereof or appeals therefrom, shall, as to all matters within the jurisdiction of said Court, apply equally thereto.

"Sec. 6. The Probate Court of Harris County shall have power to issue writs of injunction, mandamus, execution, attachment, and all writs

and process necessary to the exercise and enforcement of the jurisdiction of said Court, and also the power to punish for contempt under such provisions as are or may be provided by the general laws governing County Courts throughout the State.

"Sec. 7. There shall be two (2) terms of said Probate Court of Harris County in each year, and the first of such terms shall be known as the January-June Term, shall begin on the first Monday in January and shall continue until and including Sunday next before the first Monday in July; and the second of such terms, which shall be known as the July-December Term, shall begin on the first Monday in July and shall continue until and including Sunday next before the first Monday in the following January. The initial term of said Court shall begin on the first Monday in January, 1950.

"Sec. 8. There shall be elected in said County by the qualified voters thereof, at each General Election, a Judge of the Probate Court of Harris County, who shall be well informed in the laws of the State, and shall have been a duly licensed and practicing member of the Bar of this State for not less than five (5) consecutive years prior to his election, and who shall hold his office for two (2) years and until his successor shall have been duly qualified. A Judge of said Court shall be appointed by the Commissioners Court of Harris County as soon as may be after the passage of this Act, who shall hold office from the date of his appointment until the next General Election and until his successor shall be duly elected and qualified.

"Sec. 9. The Judge of the Probate Court of Harris County shall execute a bond and take the oath of office as required by the laws relating to County Judges.

"Sec. 10. Any vacancy in the office of the Judge of the Probate Court of Harris County may be filled by the Commissioners Court of Harris County by the appointment of a Judge of said Court, who shall serve until the next General Election and until his successor shall be duly elected and qualified.

"Sec. 11. In case of the absence, disqualification or incapacity of the Judge of the Probate Court of Harris County, the County Judge of Harris County shall sit and act as Judge of said Court, and may hear and determine, either in his own courtroom or in the courtroom of said Court, any matter or proceedings there pending, and enter any orders in such matters or proceedings as the Judge of said Court may enter if personally presiding therein.

"Sec. 12. In case of the absence, disqualification or incapacity of the Judge of the Probate Court of Harris County and the County Judge of Harris County a Special Judge of the Probate Court of Harris County may be appointed or elected, as provided by the general laws relating to County Courts and to the Judges thereof.

"Sec. 13. The County Clerk of Harris County shall be the Clerk of the Probate Court of Harris County. The seal of the Court shall be the same as that provided by law for County Courts, except that the seal shall contain the words 'Probate Court of Harris County.' The Sheriff of

Harris County shall, in person or by deputy, attend the said Court when required by the Judge thereof.

"Sec. 14. The Judge of the Probate Court of Harris County shall collect the same fees as are now or hereafter established by law relating to County Judges as to matters within the jurisdiction of said Court, all of which shall be paid by him into the County Treasury as collected, and from and after January 1, 1960, he shall receive an annual salary equal to the salary provided for the Judges of the County Courts at Law of Harris County and payable in like manner as the salary of said Judges of County Courts at Law.

"Sec. 15. All laws and parts of laws in conflict with the provisions of this Act are hereby repealed to the extent of such conflict only. As to all other laws and parts of laws, this Act shall be cumulative.

"Sec. 16. If any section, paragraph, sentence, clause, phrase or word contained in this Act shall be held unconstitutional by the Courts of this State, the invalidity of such portion of the Act shall not be construed to affect any other part of the Act."

Texas Election Code Art. 13.12:

"The request to have the name of any person affiliating with any party placed on the official ballot for the general primary as a candidate for the nomination of such party for any state office, for any district office, and for any county or precinct office or portion thereof shall be governed by the following:

"1. Such request shall be in writing, indicating whether for full term or for an unexpired term, signed and duly acknowledged by the person desiring such nomination, or by twenty-five (25) qualified voters, which request shall be endorsed by the candidate named therein showing his consent to such candidacy, if nominated. It shall state the occupation, county of residence and post-office address of such person, and if made by him shall also state his age.

"2. Any such request shall be filed with the state chairman in the case of state-wide races, with the district chairman in the case of district consisting of more than one (1) county, and with the county chairman in case of county and precinct officers; such request shall be filed not later than the first Monday in February preceding such primary, and shall be considered filed if sent to such chairman at his post-office address by registered mail from any point in this state, provided, however, that in the event that there is no candidate for the nomination of any office due to the death of the one who had filed, applications may be filed not later than the first Monday in March preceding the primary.

"3. In the case of district offices consisting of more than one (1) county if there be no chairman of such district executive committee, then the said requests to go on the ballot shall be filed as aforesaid with the chairman of each county composing such district.

"4. On the second Monday in March preceding each general primary, the state commit-

tee shall meet at some place to be designated by its chairman who shall not less than three (3) days prior to such meeting notify by mail all members of said committee and all persons whose names have been requested to be placed upon the official ballot of such designation. Such committee at this meetnig by resolution shall direct their chairman to certify to each county chairman the names and county of residence of such candidates as shown by such request. Copies of such certificates shall be immediately furnished to each newspaper in the state desiring to publish same, and one (1) copy shall at once be mailed to the chairman of the executive committee of each county.

"5. The terms of this law shall apply to the county chairman and precinct committeemen, and the names of such candidates shall not be printed on the primary ballot unless such application shall have been filed as provided herein."

Texas Election Code Art. 13.29:

"The County Clerk, under his official hand and seal, shall cause the names of the candidates who have received the necessary vote to nominate as directed by the county executive committee and as certified by the chairman of said committee, for each office, to be published in some newspaper published in the county, if any there be, but if there be no newspaper published in the county, then he shall post a list of such names in at least five (5) public places in the county, one (1) of which notices shall be posted at the courthouse door. Provided, that if a contest for the nomination for any county or

precinct office in the county be pending, posting and/or publication as to that office shall be deferred until the contest is finally determined after which, he shall post or publish as to that particular office as hereinabove set out."

Texas Election Code Art. 13.31:

"After the names of the successful candidates have been published or posted in compliance with Section 207 [art. 13.29], and all contests, if any, have been determined, the county clerk shall cause the names of all the nominees to be printed on the official ballot in the column for the ticket of that party."

Texas Election Code Art. 13.32:

"Each county clerk shall post in a conspicuous place in his office, for the inspection of the public the names of all candidates that have been lawfully certified to him to be printed on the official ballot, for at least ten (10) days before he orders the same to be printed on said ballot; and he shall order all the names of the candidates so certified printed on the official ballot as otherwise provided in this title."

Texas Election Code Art. 13.47a:

"Sec. 1. No person shall be nominated by any state, district, or county convention held pursuant to Articles 222, 223 and 224[1] of this Code unless he has filed with the chairman of the appropriate executive committee an application requesting that his name be placed before

[1] Articles 13.45, 13.46 and 13.47 respectively of the Texas Election Code.

the convention as a candidate for nomination. The application shall conform to the requirements of Article 190 of this Code (Article 13.12, Election Code, Vernon's Texas Civil Statutes), and shall be filed in the same manner and within the time prescribed by that Article, except that it shall request that the candidate's name be placed before the convention instead of requesting that his name be placed on the general primary ballot.

"Sec. 2. A person who has been nominated by a convention may decline the nomination, but he shall not be eligible for nomination by that party to any other office to be voted on at the same election except as a candidate for an unexpired term where the vacancy in office occurred subsequent to the date of the convention at which he was originally nominated.

"Sec. 3. As a condition precedent to having a candidate's name printed on the official ballot under Article 227 or Article 230[2] of this Code, there must, in addition to the requirements of those two (2) Articles, be filed, with the person with whom the written application must, thereunder, be filed, an affidavit, duly acknowledged by the person desiring his name to be placed on the ballot stating his occupation, county of residence, post office address, age, and the office for which he intends to run. The affidavit must be filed at the same time requests under Article 190[3] of this Code must be filed.

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[2] Articles 13.50 and 13.53 respectively of the Texas Election Code.

[3] Article 13.12 of the Texas Election Code.

"Sec. 4. The requirements of Sections 1 and 3 hereof shall not apply to nominees for unexpired terms where the vacancy in office occurred subsequent to the tenth day preceding the deadline for filing as prescribed herein."

Texas Election Code Art. 13.50:

"The name of a non-partisan or independent candidate may be printed on the official ballot in the column for independent candidates, after a written application signed by qualified voters addressed to the Secretary of State and delivered to him within thirty (30) days after the second primary election day as follows; if for a State office to be voted for throughout the State, one per cent (1%) of the entire vote of the State cast for Governor at the last preceding general election; if for a congressional, supreme judicial, senatorial, representative, flotorial or judicial district office, three per cent (3%) of the entire vote cast for Governor in any such district at the last preceding general election; provided, that the number of signatures need not exceed five hundred (500) for any congressional, senatorial or judicial office, nor for any other office that is not filled by all the voters of the State. No application to the Secretary of State shall contain the name of more than one (1) candidate, and no citizen shall sign such application, unless he has paid his poll tax or received his certificate of exemption; provided, that, if the office is one to which two (2) or more persons are to be elected, his application may be for as many candidates as there are persons to be elected to that office; and provided, also that no person who has voted at a primary election shall sign an application in favor of any one

for an office for which a nomination was made at such primary election."

Texas Election Code Art. 13.51:

"To every citizen who signs such application, shall be administered the following oath, which shall be reduced to writing and attached to such application, viz.: 'I know the contents of the foregoing application; I have participated in no primary election which has nominated a candidate for the office for which I (here insert the name) desire to be a candidate; I am a qualified voter at the next general election under the Constitution and laws in force, and have signed the above application of my own free will.' One (1) certificate of the officer before whom the oath is taken may be so made as to apply to all to whom it was administered."

Texas Election Code Art. 13.52:

"The Secretary of State shall, on receipt of the application which conforms to the above requirements, issue his instruction to the county clerks of this State, or of the district, as the case may require, directing that the name of the citizens, in whose favor the application is made, shall be printed on the official ballot in the independent column under the title of the office for which he is a candidate; provided, that the citizen, in whose favor the application is made, shall first file his written consent with the Secretary of State to become a candidate, within thirty (30) days after primary election day."

Texas Election Code Art. 13.53:

"Independent candidates for office at a coun-

ty, city, or town election may have their names printed upon the official ballot on application to the County Judge, if for a county office, or to the mayor, if for a city or town office, such application being in the same form and subject to the same requirements herein prescribed for applications to be made to the Secretary of State in case of State or district independent nomination; provided, that in county elections it shall be necessary for nomination of independent candidates for the independent candidate to file a petition with the County Judge, signed by five per cent (5%) of the entire vote cast in such county at the last general election, endorsing such candidate for a particular county office. And provided further, in elections for a city or town office, it shall not be necessary that independent candidates be nominated, but anyone otherwise qualified may have his name printed upon the official ballot for a particular office by filing his sworn application with the Mayor at least thirty (30) days prior to the election day and by paying such filing fees as may be required by Statute or by charter provision."

Texas Election Code Art. 14.01:

"The word 'candidate' shall mean any person who has announced to any other person or to the public that he is a candidate for the nomination for or the election to any office which the laws of this State require to be determined by an election. The words 'county office' shall mean any office to be filled by the choice of the voters residing in only one (1) county or less than one (1) county. The words 'district office' shall mean any office to be filled by the choice of the voters residing in more than one (1)

county. The words 'state office' shall mean any office to be filled by the choice of voters of the entire State. The above classification of offices shall include all offices of the United States Government filled by elections. The term 'campaign expenditure' as hereinafter used shall include any gift, loan, or payment of money or other valuable thing, or promise to give, lend, or pay money or other valuable thing, for the purpose of furthering or opposing the candidacy of any person for nomination for or election to any county, district, or state office."